



**UNITED STATES DEPARTMENT OF COMMERCE**  
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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08/358,474 12/19/94 KYLE

D 0311.48526

JORDAN EXAMINER

12M1/0314

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WASHINGTON DC 20001-4597

ART UNIT

PAPER NUMBER

1205

10

DATE MAILED:

03/14/96

**Please find below and/or attached an Office communication concerning this application or proceeding.**

**Commissioner of Patents and Trademarks**



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EXAMINER
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This is a communication from the examiner in charge of your application.  
COMMISSIONER OF PATENTS AND TRADEMARKS

DATE MAILED:

☐ This application has been examined    ☒ Responsive to communication filed on January 26, 1996    ☒ This action is made final.

A shortened statutory period for response to this action is set to expire 3 months from the date of this letter.  
Failure to respond within the time period will cause the application to become abandoned. 35 U.S.C. 133

**Part I THE FOLLOWING ATTACHMENTS ARE PART OF THIS ACTION:**

- |   |  |
|---|--|
| 1. <input type="checkbox"/> Notice of References Cited by Examiner, PTO-892.        | 2. <input type="checkbox"/> Notice re Patent Drawing, PTO-948.                   |
| 3. <input type="checkbox"/> Notice of Art Cited by Applicant, PTO-1449              | 4. <input type="checkbox"/> Notice of Informal Patent Application, Form PTO-152. |
| 5. <input type="checkbox"/> Information on How to Effect Drawing Changes, PTO-1474. | 6. <input type="checkbox"/> _____  |

**Part II SUMMARY OF ACTION**

1. ☒ Claims 21-28, 36-42 and 67-82 are pending in the application.  
Of the above claims,        are withdrawn from consideration.
2. ☒ Claims 1-20, 29-35 and 43-66 have been cancelled.
3. ☒ Claims 25-28, ~~31-32, 33-34, 35-36~~ are allowed.
4. ☒ Claims 21-24, 36-42, ~~67-82 and 73-82~~ are rejected.
5. ☐ Claims        are objected to.
6. ☐ Claims        are subject to restriction or election requirement.
7. ☐ This application has been filed with informal drawings under 37 C.F.R. 1.85 which are acceptable for examination purposes.
8. ☐ Formal drawings are required in response to this Office action.
9. ☐ The corrected or substitute drawings have been received on       . Under 37 C.F.R. 1.84 these drawings are ☐ acceptable. ☐ not acceptable (see explanation or Notice re Patent Drawing, PTO-948).
10. ☐ The proposed additional or substitute sheet(s) of drawings, filed on        has (have) been ☐ approved by the examiner. ☐ disapproved by the examiner (see explanation).
11. ☐ The proposed drawing correction, filed on        has been ☐ approved. ☐ disapproved (see explanation).
12. ☐ Acknowledgment is made of the claim for priority under 35 USC 119. The certified copy has ☐ been received ☐ not been received  
☐ been filed in parent application, serial no.       ; filed on       .
13. ☐ Since this application appears to be in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11; 453 O.G. 213.
14. ☐ Other

EXAMINER'S ACTION

Art Unit: 1205

Claims 21-28, 36-42, and 67-82 are pending in this application.

The amendment received on January 26, 1996 has been entered.

Claims 21-24, 36-39, 67-74, and 77-82 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-10 and 20-22 of U.S. Patent No. 5,374,657. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the application are equivalent to or encompassed by the claims of the patent. Furthermore, claims of the application specifying the oil source are also obvious because the source does not change the chemical structure of the triglyceride or fatty acid.

The non-statutory double patenting rejection, whether of the obvious-type or non-obvious-type, is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent. *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); *In re Van Ornam*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); and *In re Goodman*, 29 USPQ2d 2010 (Fed. Cir. 1993).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321 (b) and (c) may be used to overcome an actual or provisional rejection based on a non-statutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.78 (d).

Effective January 1, 1994, a registered attorney or agent of record may sign a Terminal Disclaimer. A Terminal Disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Art Unit: 1205

The applicant's remarks regarding the filing of a terminal disclaimer are noted.

Claims 36-42 and 75-82 are rejected under 35 U.S.C. § 103 as being unpatentable over Japanese Patent Application #196,255 and PCT Application #WO 89/00606 in view of Clandinin et al. and Traitler et al. for reasons already of record.

The applicant's remarks have been considered but are unpersuasive. Claim 36 recites a composition "comprising" a blend of DHA, GLA, and ARA. The term "comprising" would allow the addition of EPA which, as applicant explained in the January 26, 1996 response, would lead to the inhibition of ARA production and/or metabolism. The limitation of claim 36 to a composition "consisting essentially of" a blend of oils would obviate the rejection. Furthermore, claim 40 recites the addition of EPA. As applicant has stated the ARA:EPA ratio is critical and must be at least 5:1. Thus claims containing EPA as well as ARA should also recite the critical ratio of ARA:EPA of at least 5:1.

Claims 25-28 are allowed.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. § 1.136(a).

A SHORTENED STATUTORY PERIOD FOR RESPONSE TO THIS FINAL ACTION IS SET TO EXPIRE THREE MONTHS FROM THE DATE OF THIS ACTION. IN THE EVENT A FIRST RESPONSE IS FILED WITHIN TWO MONTHS OF THE MAILING DATE OF THIS FINAL ACTION AND THE ADVISORY ACTION IS NOT MAILED UNTIL AFTER THE END OF THE THREE-MONTH SHORTENED STATUTORY PERIOD, THEN THE SHORTENED STATUTORY PERIOD WILL EXPIRE

Serial Number: 08/358,474

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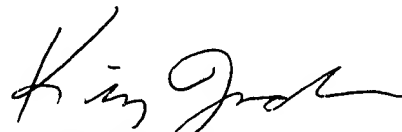
Art Unit: 1205

ON THE DATE THE ADVISORY ACTION IS MAILED, AND ANY EXTENSION FEE PURSUANT TO 37 C.F.R. § 1.136(a) WILL BE CALCULATED FROM THE MAILING DATE OF THE ADVISORY ACTION. IN NO EVENT WILL THE STATUTORY PERIOD FOR RESPONSE EXPIRE LATER THAN SIX MONTHS FROM THE DATE OF THIS FINAL ACTION.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kimberly Jordan whose telephone number is (703) 308-4611. The fax phone number for this Group is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1235.

JORDAN:jd  
MARCH 07, 1996

  
KIMBERLY JORDAN  
PRIMARY EXAMINER  
GROUP 1200